Nos. 86-622 and 86-737

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

EUGENE TRAYNOR,
Petitioner
v.
THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS AFFAIRS AND VETERANS' ADMINISTRATION,
Respondent

JAMES P. MCKELVEY,
Petitioner
v.
THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS AFFAIRS AND VETERANS' ADMINISTRATION,
Respondent

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second and District of Columbia Circuits

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN PSYCHIATRIC ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF BOTH PETITIONERS

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QUESTION PRESENTED

Amici curiae will address the following question:

Whether a Veterans' Administration regulation, which defines the disease of primary alcoholism as *per se* willful misconduct and thus automatically denies extended education benefits to veterans suffering from the disease without an individualized determination about the origins and nature of their affliction, violates Section 504 of the Rehabilitation Act of 1973?

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
MEDICAL, STATUTORY AND REGULATORY BACKGROUND	2
A. Alcoholism Is A Disease	2
B. Section 504 Recognizes Alcoholism As A Possible Handicap And Does Not Distinguish Between Primary and Secondary Alcoholism	8
C. The Veterans' Administration's Regulatory Scheme	11
SUMMARY OF ARGUMENT	13
ARGUMENT	15
I. SECTION 504 REQUIRES INDIVIDUALIZED DETERMINATIONS ABOUT WHETHER AN INDIVIDUAL WHO SUFFERS—OR WHO HAS SUFFERED—FROM THE DISEASE OF ALCOHOLISM IS "HANDICAPPED" AND "OTHERWISE QUALIFIED"	15
II. THE VETERANS' ADMINISTRATION'S DETERMINATION THAT PRIMARY ALCOHOLISM IS WILLFUL MISCONDUCT *PER SE* IS INVALID UNDER SECTION 504	20
CONCLUSION	25

TABLE OF AUTHORITIES

Cases Page

Alexander v. *Choate*, 469 U.S. 287 (1985) 17
Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962) 24
Consolidated Rail Corp. v. *Darrone*, 465 U.S. 624 (1984) 17
School Board of Nassau County v. *Arline*, No. 85-1277, slip op. (March 3, 1987) ..... *passim*
Watt v. *Alaska*, 451 U.S. 259 (1981) 25

Statutes and Regulations

29 U.S.C. § 706(7)(B) 10, 16, 19
29 U.S.C. § 794 ..... 2, 8, 10, 16
38 U.S.C. § 1662 11
38 U.S.C. § 1662(a)(1) 11, 20, 24
38 C.F.R. § 3.1(n) 11
38 C.F.R. § 3.301(c)(2) 12, 21, 23, 25
38 C.F.R. Part 18, Subp. D, App. A 10, 21
38 C.F.R. § 18.403(j)(2)(i)(C) 11
38 C.F.R. § 18.403(k)(3) 20
45 C.F.R. § 84.3(j) 17
45 C.F.R. § 84.3(k) 17, 20
45 C.F.R. Part 84, App. A 10
45 C.F.R. § 84.53 9

Legislative Materials

H. Rep. No. 571, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Ad. News 3471 9
S. Rep. No. 1297, 93d Cong., 2d Sess. (1974) 15, 17
S. Rep. No. 103, 96th Cong., 1st Sess., *reprinted in* 1979 U.S. Code Cong. & Ad. News 2681 13
42 Fed. Reg. 22676 (May 4, 1977) 17
43 Fed. Reg. 2137 (Jan. 13, 1978) 10

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TABLE OF AUTHORITIES—Continued

	Page
Administrator's Decision, Veterans' Administration, No. 2 (March 21, 1931)	12
Administrator's Decision, Veterans' Administration, No. 988 (Aug. 23, 1964)	11
American Medical Association, *Manual on Alcoholism* (1957)	3, 4
American Medical Association Report of the Council on Scientific Affairs, *Alcoholism as A Disability* (December 1980)	4
American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd Ed. 1980)	4
American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd Ed. Revised 1987)	3, 4, 7
Ashley & Rankin, *Hazardous Alcohol Consumption and Diseases of the Circulatory System*, 41 J. Stud. Alcohol 1040 (1980)	8
Bohman, *Some Genetic Aspects of Alcoholism and Criminality: A Population of Adoptees*, 35 Arch. Gen. Psychiatry 269 (1978)	6
Categories, Careers, and Outcomes of Alcoholism, The Lancet (March 19, 1986)	5
Criteria Committee of the National Council on Alcoholism, *Criteria for the Diagnosis of Alcoholism*, 129 Am. J. Psychiatry 127 (1972)	5
Exec. Order 6098, (March 31, 1933)	12
Feighner, *et al.*, *Diagnostic Criteria for Use in Psychiatric Research*, 26 Arch. Gen. Psychiatry 57 (1972)	5
Hall, Skinner & Israel, *Early Identification of Alcohol Abuse :2: Clinical and Laboratory Indicators*, 124 Can. Med. Assoc. J. 1279 (1981)	8
Jellinek, *The Disease Concept of Alcoholism* (1960)	4
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TABLE OF AUTHORITIES—Continued

Page

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43 Op. Att'y Gen. No. 12 (1977) 9, 18, 19

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Schuckit, *Genetic and Clinical Implications of Alcoholism and Affective Disorder*, 143 Am. J. Psychiatry 140 (1986) 7

Schuckit, *Genetic Aspects of Alcoholism*, 15 Ann. Emerg. Med. 991 (Sept. 1986) 6

Talbott, *Alcoholism and Other Drug Addictions: A Primary Disease Entity*, 75 J. Med. Assn. Ga. 490 (August 1986) 13

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Vaillant, *The Natural History of Alcoholism* (1983) 6

World Health Organization, *International Classification of Diseases* (9th ed. 1977) 4

Zimbert, *The Clinical Management of Alcoholism* (1982) 8

Zook & Moore, *High-Cost Users of Medical Care*, 302 N. Engl. J. Med. 996 (1980) 8

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN PSYCHIATRIC ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF BOTH PETITIONERS

INTEREST OF *AMICI CURIAE*

Amicus American Medical Association ("AMA") is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, its membership exceeds 280,000 physi-

cians and medical students nationwide. *Amicus* American Psychiatric Association ("APA") is the nation's largest professional association specializing in psychiatry, with a membership exceeding 30,000 physicians. APA's purposes include promoting the welfare of patients who require psychiatric services.

At issue in this case is a regulation of the Veterans' Administration ("VA") which conclusively presumes that alcoholism involves "willful misconduct" unless it can be shown that the alcoholism is the product of an underlying psychiatric disorder. The VA's *per se* rule was upheld by the D.C. Circuit on the basis that it was consistent with "general societal perceptions" concerning alcoholism. No. 86-737, Pet. App. 12a. The court expressly disavowed reliance upon any "medical judgments" about alcoholism on the ground that they are "immaterial." *Id.* at 11a, 12a. *Amici* believe that disregard of medical facts concerning a handicap, such as alcoholism, is manifestly inconsistent with the language and purpose of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Accordingly, *amici* wish to present their views concerning alcoholism and explain why it is inappropriate to permit the VA to deny veterans a benefit on the ground that their "handicap"—"primary alcoholism"—must always be the result of "willful misconduct."[1]

MEDICAL, STATUTORY AND REGULATORY BACKGROUND

A. Alcoholism Is A Disease

Ninety-five million Americans consume alcoholic beverages, and it is estimated that 11 percent, or 10 million of them, suffer from alcoholism. U.S. Dept. of Health,

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

Education, and Welfare, *The Alcohol, Drug Abuse, and Mental Health National Data Book* 15 (1980). Physicians estimate that between 20 and 25 percent of all general hospital admissions and one-third of all psychiatric admissions are directly or indirectly related to the use of alcohol. Knott, *Alcohol Problems: Diagnosis and Treatment* 6 (1986). When all the direct and indirect consequences of the disease are taken into account, alcoholism ranks as the third leading cause of death in the United States. Miller & Frances, *Psychiatrists and the Treatment of Addictions: Perceptions and Practices*, 12 Am. J. Drug & Alcohol Abuse 187, 188 (1986).

Alcoholism is defined generally as the chronic, pathological use of alcohol. There has been a consensus in the medical profession for nearly 30 years that such pathological use of alcohol is a disease. *Amicus* AMA first described alcoholism as a disease appropriate for medical treatment in 1956, stating that:

> Alcoholism is an illness characterized by preoccupation with alcohol and loss of control over its consumption such as to lead usually to intoxication if drinking is begun; by chronicity; by progression; and by tendency toward relapse. It is typically associated with physical disability and impaired emotional, occupational, and/or social adjustments as a direct consequence of persistent and excessive use.

American Medical Association, *Manual on Alcoholism* 6 (1957). Similarly, *amicus* APA has long recognized that alcoholism is a disease, classifying it as a distinct mental disorder since the publication of its first edition of *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") in 1952.[2] The World Health Organiza-

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[2] The current diagnostic criteria for alcoholism are contained in DSM-III-R, published in 1987. Since 1980, the APA has subdivided the mental disorder of alcoholism into two general categories—alcohol dependence and abuse, and alcohol-induced organic mental disorders. The former category is what we commonly think of as

tion ("WHO") has recognized alcoholism as a distinct disease since 1951. *International Classification of Diseases, Ninth Edition* (ICD-9) (WHO, 1977) (No. 303, alcohol dependence syndrome).

Contrary to popular misconceptions, occasional excessive use of alcohol is not synonymous with the disease of alcoholism. As the AMA has emphasized, "[c]onsumption of very substantial amounts of alcohol . . . and frequent intoxication *per se* are *not necessarily equated* with alcoholism, even though these signs usually are prominent in the course of the illness." AMA, *Manual on Alcoholism* 6 (1957) (emphasis in original). Rather, the distinguishing feature of the disease of alcoholism is chronic, uncontrollable use. In the words of the original AMA statement on alcoholism, "*[t]he key factor is in control.*" *Id.*

Unlike diseases such as tuberculosis that have purely physiological causes and manifestations, the disease of alcoholism has a variety of causes and a multitude of manifestations leading to physiological, psychological and social impairment. AMA Report of the Council on Scientific Affairs, *Alcoholism as a Disability* (Dec. 1980). The variety of causes and symptoms has complicated the task of developing diagnostic criteria for alcoholism. E.M. Jellinek, who is widely credited with spurring the medical community to recognize alcoholism as a disease, described five distinct types of alcoholism. Jellinek, *The Disease Concept of Alcoholism* (1960). Later, work by researchers from the Washington University in St. Louis led to the development of four categories of symptoms

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the disease of alcoholism, distinguished by chronic, pathological use of, and in some cases physical dependence on, alcohol. DSM-III, p. 169 (1980). In contrast, the second category includes a variety of organic mental disorders that are attributed to the ingestion of alcohol, such as alcohol hallucinosis and alcohol withdrawal delirium. DSM-III-R, pp. 127-34 (1987).

for use in diagnosing alcoholism. Feighner, *et al.*, *Diagnostic Criteria for Use in Psychiatric Research*, 26 Arch. Gen. Psychiatry 57, 60-61 (1972); see also Paredes, *Models and Definitions of Alcoholism*, in Alcoholism: Development, Consequences, and Interventions 57 (Estes & Heinemann eds. 1986). In 1972, the National Council on Alcoholism established elaborate criteria for the diagnosis of alcoholism, including 28 major and 58 minor physiological, behavioral, psychological and attitudinal parameters. Criteria Committee of the National Council on Alcoholism, *Criteria for the Diagnosis of Alcoholism*, 129 Am. J. Psychiatry 127-35 (1972).

Despite the difficulty of establishing universally agreed upon diagnostic criteria for alcoholism, the medical community has accepted a division of alcoholism into two very general diagnostic categories, primary and secondary, *Categories, Careers, and Outcomes of Alcoholism*, The Lancet 719 (March 19, 1986). This shorthand division distinguishes those patients whose illness is not the result of a pre-existing psychiatric disorder (primary alcoholism) from those whose illness is secondary to psychiatric problems (secondary alcoholism). *Id.* This division by etiology of alcoholism is useful for treatment purposes, but it does not distinguish types of alcoholism on the basis of which constitutes an illness. Both primary and secondary alcoholism are generally accepted by the medical community to be diseases.

In the last 20 years medical researchers have conducted extensive studies in order to determine the etiology of primary alcoholism. Those studies have revealed that primary alcoholism may result from a variety of causes and that certain factors predispose a given individual to developing primary alcoholism. Scientists have found that, in contrast to the development of secondary alcoholism, primary alcoholism has a strong genetic link. Family studies have revealed that sons and

daughters of alcoholics are three to four times as likely to develop primary alcoholism as are children of non-alcoholic parents. Schuckit, *Genetic Aspects of Alcoholism*, 15 Ann. Emerg. Med. 991, 992 (Sept. 1986). In order to separate out the impact of heredity from that of environment in the development of primary alcoholism, other researchers have studied alcoholism rates of adults in Sweden adopted before the age of 3. Those studies found that adopted sons whose biological fathers were alcoholic were three times more likely to become alcoholic than were adopted sons of non-alcoholic biological fathers. Bohman, *Some Genetic Aspects of Alcoholism and Criminality: A Population of Adoptees*, 35 Arch. Gen. Psychiatry 269-76 (1978).[3]

Environmental, socio-cultural and psychological factors play a role in the development of primary alcoholism,[4] much as they do in the development of diseases such as coronary atherosclerosis, diabetes and schizophrenia. Vaillant, *The Natural History of Alcoholism* 45-101 (1983). Those factors do not, however, rise to the level of psychiatric disorders as defined by the APA. Thus, the mere presence of a psychological component in the development of alcoholism in a given individual does not necessarily mean that the individual is afflicted with

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[3] Further studies have also identified a severe type of hereditary predisposition that occurs only among men. The studies found that adopted sons whose biological fathers suffer from this male-limited alcoholism are 9 times more likely to develop the disease. National Institute on Alcohol Abuse and Alcoholism, *Alcoholism: An Inherited Disease* 9, 11 (1985), citing Cloninger, Bohman & Sigvardsson, *Inheritance of Alcohol Abuse*, 38 Arch. Gen. Psychiatry 861-68 (1981).

[4] Summarizing the results of the numerous studies of the genetic link in alcoholism, one researcher concluded that "[n]o findings from genetically-oriented research have disputed the significance of behavioral, psychodynamic, existential and social-group factors in . . . explaining the drinking of the alcoholic individual." Peele, *The Implications and Limitations of Genetic Models of Alcoholism and Other Addictions*, 47 J. Stud. Alcohol 63, 71 (1986).

"secondary alcoholism." Only when the alcoholism is the result or manifestation, in large part, of a pre-existing psychiatric disorder, is a diagnosis of secondary alcoholism appropriate. Schuckit estimates that 20 to 30 percent of alcoholics suffer from secondary alcoholism. Schuckit, *Genetic and Clinical Implications of Alcoholism and Affective Disorder*, 143 Am. J. Psychiatry 140 (1986).

The distinction between primary and secondary alcoholism is important in determining the most effective mode of treatment, but it may be difficult for the physician to make a proper diagnosis. For example, many alcoholics begin a pattern of chronic, uncontrolled drinking while quite young, some while still teenagers. DSM-III-R, p. 174 ("In males the onset [of alcohol dependence]is usually in the late teens or the 20s, the course is insidious, and the person may not me fully aware of his dependence on alcohol until the 30s.") Due to cultural factors and family income level, such youngsters may be very unlikely to receive any psychiatric evaluation that would *predate* the more immediately apparent "symptom" of excessive, uncontrolled drinking. Thus, it is unlikely that there would be a prior evaluation of psychiatric disorders to support a diagnosis of an individual's alcoholism as secondary.

The difficulty in establishing an accurate diagnosis of primary as opposed to secondary alcoholism is further complicated by the fact that primary alcoholics often exhibit symptoms of psychiatric disorders caused by the effect of alcohol on the neurotransmitters in the brain. For instance, an individual who is alcohol-dependent and has engaged in heavy drinking for an extended period of time may develop alcohol hallucinosis, a disorder in which the person suffers from hallucinations, often persecutory, that may be clinically indistinguishable from schizophrenia. DSM-III-R, pp. 131-32. Because a primary alcoholic may exhibit such symptoms of psychiatric disorders, it is necessary to observe a patient alcohol-free

for three or four weeks in order to establish an accurate diagnosis of primary as opposed to secondary alcoholism. Zimbert, *The Clinical Management of Alcoholism* 40 (1982). If the psychiatric symptoms persist once the physiological effects of alcoholism have subsided, the physician can reasonably assume that the psychiatric disorder is causal and predates the secondary manifestation of alcoholism. *Id.* But, alcoholics are typically admitted to medical or psychiatric facilities for a brief period of time (No. 86-622, Pet. App. 92a-93a; No. 86-737, C.A. App. 30-32 (despite serious alcoholism and related complications, neither petitioner was hospitalized for more than two weeks at any one time)), and therefore, the diagnosis of primary or secondary alcoholism rendered at such a time has little guarante of accuracy.

In addition to the psychological consequences of anxiety and depression that often accompany alcoholism, there are a variety of organic diseases that may result from either primary or secondary alcoholism. Such diseases include cirrhosis of the liver and alcohol hepatitis (Zook & Moore, *High-cost Users of Medical Care*, 302 N. Engl. J. Med. 996 (1980)), erosive gastritis (Hall, Skinner & Israel, *Early Identification of Alcohol Abuse* :2: *Clinical and Laboratory Indicators*, 124 Can. Med. Assoc. J. 1279, 1280 (1981)), delirium tremens (*Id.*), hypertension (Ashley & Rankin, *Hazardous Alcohol Consumption and Diseases of the Circulatory System*, 41 J. Stud. Alcohol 1040 (1980)), cerebral atrophy, dementia and polyneuritis (Paredes, *Models and Definitions of Alcoholism*, in Alcoholism: Development, Consequences, and Interventions 54 (Estes & Heinemann eds. 1986)).

B. Section 504 Recognizes Alcoholism As a Possible Handicap And Does Not Distinguish Between Primary and Secondary Alcoholism

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, prohibits an Executive agency from denying the benefits of any of its programs to someone solely on the basis

that the individual is handicapped. The statute provides in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in Section 7 [29 U.S.C. § 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .[5]

Section 504 has consistently been interpreted to include alcoholics as "handicapped individuals," and to treat alcoholism as a disabling disease.

When asked specifically to address the issue of alcoholism as a disability under Section 504 in 1977, the Attorney General issued a formal opinion confirming that "section 504 does in general prohibit discrimination against alcoholics and drug addicts in federally assisted programs solely because of their status as such, *just as it prohibits discrimination solely on the basis of other diseases* or conditions covered by the Act . . . . The legislative history of the Rehabilitation Act of 1973 indicates that drug addiction and *alcoholism were to be regarded as covered physicial or mental disabilities.*" 43 Op. Att'y Gen. No. 12 (April 12, 1977) at 2 (emphasis added).

In 1977, the Secretary of the Department of Health, Education and Welfare (HEW, now the Department of Health and Human Services) promulgated regulations pursuant to section 504 which prohibit federally-funded

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[5] In October, 1986, the term "handicapped individual" was changed to "individual with handicaps" in response to testimony before Congress describing the former language as "inadvertently adding to the stereotype that persons with handicaps are less worthy." H. Rep. No. 571, 99th Cong., 2d Sess. 17, *reprinted in* 1986 U.S. Code Cong. & Ad. News 3471, 3487. Since the court of appeals discussed the prior language, we will cite to the pre-1986 language as well.

hospitals and outpatient facilities from discriminating against alcoholics in admission or treatment. 45 C.F.R. § 84.53. In an extensive analysis accompanying the regulation, the Secretary emphasized that there is a "medical and legal consensus" that alcoholism is a disease. 45 C.F.R. Part 84, App. A at 326. Moreover, the Secretary carefully distinguished between the "behavioral manifestations" of alcoholism, which may be taken into account when assessing eligibility for services, and the condition of alcoholism itself, which may not provide the basis for the denial of benefits or services. *Id.* The 1978 HEW guidelines implementing Section 504 specifically included alcoholics within the meaning of "handicapped person." The regulation provided that " 'physical or mental impairment' [for the purposes of identifying a handicapped person] includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism." 43 Fed. Reg. 2137 (1978).

In 1978, Congress amended Section 504 to clarify, *inter alia*, that for the purposes of employment Section 504 does not treat an alcoholic whose current use of alcohol either prevents him from performing his job duties or presents a direct threat to the property or safety of others as a handicapped individual. 29 U.S.C. § 706 (7)(B). The amendment did not otherwise limit the applicability of Section 504 to alcoholics, clearly indicating that alcoholics otherwise remain protected under Section 504. Moreover, in 1978 Congress for the first time extended Section 504's prohibition against discrimination based on handicap to all federal agencies, including the Veterans' Administration. 29 U.S.C. § 794 (1982).[6]

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[6] The VA regulations implementing Section 504 include the veterans' educational benefits program as one of the programs covered by Section 504. 38 C.F.R. Part 18, Subp. D, App. A. And, in 1980,

C. The Veterans' Administration's Regulatory Scheme

Petitioners McKelvey and Traynor are veterans who had requested educational benefits from the Veterans' Administration pursuant to 38 U.S.C. § 1662. Although neither had fully used his benefits within the ordinary time provided for by the statute, both requested an extension of the time limit under a provision that grants such extensions to "any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct." 38 U.S.C. § 1662(a)(1). Both claimed that they had been alcoholics during the period subsequent to their discharges and that their condition had precluded them from seeking an education within the specified period.

The VA rejected the extension on the ground that each petitioner's alcoholism had constituted "willful misconduct." That term is defined in the regulations as "an act involving conscious wrongdoing or known prohibited action [that] involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n). Although neither the statute nor the regulation makes any reference to "alcoholism," the VA has interpreted its regulation to require "primary alcoholism" to be treated automatically as "willful misconduct." V.A. Decision No. 988, Aug. 13, 1964. Because neither petitioner could prove that his alcoholism was the product of a distinct psychiatric disorder, the VA denied them benefits without any factual inquiry into whether either actually had engaged in any "willful misconduct" that caused his disease.

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the VA adopted the HEW guidelines, specifically using the exact language quoted in the definition of "handicapped person." 38 C.F.R. § 18.403(j)(2)(i)(C).

The origins of the Veterans' Administration rule treating alcoholism as willful misconduct date back over fifty years, to a time when alcoholism was poorly understood by the general public and little studied by the medical community. The precursor to Section 3.301(c)(2) specified that disabilities resulting from "an act contrary to principles of good morals . . . gross negligence, gross carelessness [or] alcoholism" would be deemed the result of misconduct. Exec. Order 6098 (March 31, 1933). Thus, the original VA regulation created a *per se* rule that all disabilities caused by or resulting from alcoholism are necessarily due to willful misconduct.

By equating alcoholism with acts contrary to the "principles of good morals," the original VA regulation reflected Prohibition era concepts of alcoholism as a moral blight, a reflection of weak will rather than disease. Aaron & Musto, *Temperance and Prohibition in America: A Historical Overview* in Alcohol and Public Policy: Beyond the Shadow of Prohibition 160 (Moore & Gerstein eds. 1981). Under the then-dominant view of alcoholism often referred to as the "sin" model, the "sinful" alcoholic was considered capable of reforming himself through the exertion of will. *Id.* at 46. The Prohibition era roots and presumptions are also reflected in the first VA Administrator's Decision involving alcohol, in which the Administrator stated that "if in the drinking of any beverage for the purpose of enjoying its intoxicating effects, excessive indulgence leads to disability, *willful misconduct would undoubtedly inhere* in the act." Administrator's Decision, Veterans' Administration, No. 2 (March 21, 1931) (emphasis added).

The presumptions underlying the current *per se* rule, which treats primary alcoholism as willful misconduct, are contrary to the great weight of modern medical understanding of alcoholism. Since the original VA alcoholism decision in 1931, the medical understanding of

alcoholism has advanced enormously.[7] With the repeal of Prohibition in 1933 and the creation of Alcoholics Anonymous in 1935, social and medical views conerning alcoholism began to change. As noted, pp. 3-4 *supra*, by 1968 virtually every major medical and health organization had recognized alcoholism as a distinct, albeit complex disease. Congress explicitly recognized this medical consensus when it enacted and extended the Comprehensive Alcoholism Act, S. Rep. No. 103, 96th Cong., 1st Sess. 3-4, *reprinted in* 1979 U.S. Code Cong. & Ad. News, 2681, 2682-83. Despite the difficulty of making an accurate diagnosis of primary versus secondary alcoholism (*supra*, pp. 7-8), and despite the persuasive body of medical evidence demonstrating that factors entirely outside the control of the individual, such as genetic predisposition, play a crucial role in the development of primary alcoholism in many individuals, the Veterans' Administration has persisted in adhering to a *per se* rule that irrebuttably presumes that any veteran who is diagnosed as a primary alcoholic has engaged in willful misconduct. On the basis of that rule alone, petitioners were denied educational assistance benefits by the VA.

SUMMARY OF ARGUMENT

This case requires the Court to apply Section 504 to extensions of educational benefits that have been denied on the basis of a Veterans' Administration regulation which conclusively treats primary alcoholism as willful misconduct. Millions of Americans suffer from primary alcoholism, not only from the debilitating effects of the disease, but also from the moral stigma that many in society still attach to those who are diagnosed as alco-

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[7] The advance in medical understanding of alcoholism in the past two decades is remarkable. In the words of a physician who has extensive experience treating alcoholism, "[w]e have learned more in the past 15 years about the disease of chemical dependency than in the past 5000 years." Talbott, *Alcoholism and Other Drug Addictions: A Primary Disease Entity*, 75 J. Med. Assn. Ga. 490 (August 1986).

holic. The causes and manifestations of alcoholism are diverse and vary greatly from individual to individual. Nevertheless, the VA refuses to treat primary alcoholics as individuals and instead categorically denies them extended educational benefits in clear disregard of Section 504's non-discrimination mandate.

As this Court recently reiterated in *School Board of Nassau County* v. *Arline*, No. 85-1277, slip op. (March 3, 1987), Section 504 was enacted to protect the handicapped against discrimination stemming from prejudice, fear and stereotype. In order to achieve this goal, Section 504 requires federal agencies to make reasonable, individualized medical judgments as to whether an individual is handicapped and "otherwise qualified" for a benefit. Furthermore, both the Attorney General and the Congress have made clear that Section 504 requires that individualized determinations be made concerning persons impaired by alcoholism.

However, neither petitioner in this case was permitted to present individualized evidence to the Veterans' Administration concerning the origins of his disease in order to show that there has been no willful misconduct. Despite the fact that both petitioners were handicapped and otherwise qualified within the meaning of Section 504 for extended educational benefits, both were automatically deemed ineligible for such benefits on the basis of an administrative rule that conclusively deems their primary alcoholism to have been caused by willful misconduct. Under the VA's rule, once a veteran is diagnosed as suffering from primary alcoholism, he or she is prevented from putting on any evidence that the cause of that alcoholism was not willful misconduct. This rule reflects nothing more than outdated attitudes towards, and fear of, alcoholism. It is also contrary to the great weight of contemporary medical evidence which views alcoholism as a disease of complex etiology that is often not the product of volition.

The court of appeals contends that this *per se* rule does not conflict with Section 504's clear prohibition against discrimination based on alcoholism because the rule looks to "conduct" rather than "handicap." This "distinction" between alcoholism as disease and alcoholism as conduct is invalid under Section 504 because it permits the VA to define as "conduct" what is in fact a handicap. If the agency is then permitted to prevent any proof that the individual did not engage in any willful misconduct, a handicapped individual will have lost by administrative fiat all the protections which Congress sought to provide by enacting Section 504.

Furthermore, no deference is owed to the VA's presumption that *all* primary alcoholism is the result of volitional conduct. The VA has never reconsidered its *per se* rule in light of Section 504's mandate of individualized decisionmaking. Thus, there is no administrative basis for the VA's approach other than a *post hoc* rationalization developed by counsel on appeal and not relied upon by the agency itself. No deference should be accorded to such *post hoc* rationalization.

ARGUMENT

I. SECTION 504 REQUIRES INDIVIDUALIZED DETERMINATIONS ABOUT WHETHER AN INDIVIDUAL WHO SUFFERS—OR WHO HAS SUFFERED—FROM THE DISEASE OF ALCOHOLISM IS "HANDICAPPED" AND "OTHERWISE QUALIFIED"

As this Court reiterated last term in *School Board of Nassau County* v. *Arline*, No. 85-1277, slip op. (March 3, 1987) ("*Arline*"), Congress enacted Section 504 to protect the handicapped against discrimination stemming from prejudice, fear and stereotype which was often based on "archaic attitudes and laws." *Arline*, slip op. at 4 quoting from S. Rep. No. 1297, 93rd Cong., 2d Sess.

50 (1974). The statutory language, legislative history, implementing regulations and decisions of this Court make clear that the key to achieving this goal is an *individualized* assessment—based on the facts relevant to the allegedly handicapped person—of whether the individual is or was handicapped and is "otherwise qualified" for a benefit.

The express language of Section 504 emphasizes that no "otherwise qualified handicapped *individual*" shall be discriminated against on the basis of his handicap. 29 U.S.C. § 794 (emphasis added). A "handicapped individual" is defined in the statute as

> "*any person* who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B) (emphasis added).

Similarly, the legislative history of Section 504 clearly shows that Congress wanted individualized assessments on the issues of "handicap" and "otherwise qualified" in order to avoid unthinking or outmoded decisions based on the myths and stereotypes which had unfairly shackled the handicapped in the past. *Arline*, slip op. at 11. As the key Senate Report stated,

> "The public lacks adequate knowledge about the potential of these [handicapped] individuals to contribute significantly to society. Too often we *automatically* make the assumption that nothing can be done. . . . *It is against the basic tenets of the scientific process to make an assumption of no hope and no help.* No less should be true of public policy. In the case of individuals with handicaps, making this assumption all too often has resulted in the violation of their basic rights as human beings and has condemned them to live useless lives." S. Rep. No.

1297, 93rd Cong., 2d Sess. 50 (1974) (emphasis added).[8]

The regulations implementing Section 504 which were promulgated in 1977 by the then Department of Health, Education and Welfare also emphasize the importance of individualized assessments. 42 Fed. Reg. 22676 (1977); 45 C.F.R. § 84.3(j). See also *Arline*, slip op. at 5 ("In determining whether a *particular individual* is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance.") (emphasis added).[9] The definitions of a "physical or mental impairment," 45 C.F.R. § 84.3(j)(2)(i), "major life activities," 45 C.F.R. § 84.3(j)(2)(ii), and "otherwise qualified," 45 C.F.R. § 84.3(k), clearly indicate that these fundamental inquiries required by the statute are to be conducted on a case-by-case, person-by-person basis.

This Court's *Arline* decision underscores the importance of individualized inquiries into facts relating to individuals who have been handicapped, like petitioners here, by a disease, albeit in *Arline* the disease was contagious. With respect to the issue of whether a person is handicapped, this Court noted that Congress sought to counter "society's accumulated myths and fears about disability and disease." *Arline*, slip op. at 9. The Court emphasized that:

> "The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps

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[8] This language related specifically to the need for a national conference mandated by the same legislation which broadened the definition of "handicapped individual." But the passage expresses the general Congressional policy which underlies Section 504.

[9] This Court has recognized that the regulations were drafted with the "oversight and approval of Congress, see *Consolidated Rail Corporation* v. *Darrone*, 465 U.S. 624, 634-635, and nn.14-16 (1984); they provide 'an important source of guidance on the meaning of § 504,' *Alexander* v. *Choate*, 469 U.S. 287, 304, n.24 (1985)." *Arline*, slip op. at 5.

with actions based on reasoned and medically sound judgments . . . ." *Id.* at 10.

Accordingly, the Court concluded that mere contagion would not automatically remove an individual from the definition of "handicapped individual" and each case should be "evaluated in light of medical evidence" and other relevant facts to determine if the person was indeed handicapped within the meaning of the statute. *Id.* at 11. Similarly, the Court stressed that, with respect to the issue of whether a person with a disease was "otherwise qualified" for a particular benefit, the decisionmaker should "conduct *an individualized inquiry* and make appropriate findings of fact" relevant to the specific person. *Id.* at 12 (emphasis added). The Court stated that:

> "Such an [individualized] inquiry is essential if § 504 is to achieve its *goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes or unfounded fear . . . .*" *Id.* (emphasis supplied.)

Finally, both the Attorney General and the Congress have made clear that individualized determinations are to be made under Section 504 with respect to persons impaired by alcoholism. In 1977, responding to a request from the Secretary of HEW, the Attorney General issued an opinion concluding that alcoholics could be "handicapped" and "otherwise qualified" within the meaning of the statute, depending on the facts relating to each individual. 43 Op. Att'y Gen. No. 12 (April 12, 1977). In words with prophetic import for this case, the Attorney General stated,

> ". . . [A] person could not be refused service solely because he is or has a record of being . . . [an] alcoholic . . . .
>
> ". . . [T]he statute requires that . . . [affected government agencies] not automatically deny employment or benefits to persons solely because they might

> find their status as alcoholics . . personally offensive." *Id.* at 12-13.

As this Court stated in *Arline*, slip op. at n.14, Congress in 1978 recognized that government agencies might have "legitimate reasons not to extend jobs or benefits to . . . alcoholics, but also understood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under" Section 504. Thus, Congress rejected a House proposal to exclude alcoholics from Section 504's protection and instead reiterated the need for individualized determinations on the issues of "handicap" and "otherwise qualified." *Arline* slip op. at n.14, citing 124 Cong. Rec. 30322 (1978). See also 43 Op. Atty. Gen. No. 12 (1977).

* * * *

There appears to be no serious dispute in this case that petitioner McKelvey is both "handicapped" and "otherwise qualified" within those statutory terms as construed by this Court.[10] Surely if Ms Arline was a handicapped individual due to her single hospitalization, *Arline*, slip op. at 6-7, then petitioner McKelvey, who was hospitalized 33 times for alcoholism (No. 86-737, C.A. App. 30-32) is also a handicapped individual. See 29 U.S.C. § 706(7)(B)(ii) (person "handicapped" if he has a

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[10] Similarly, there is no dispute in *Traynor* that petitioner is both "handicapped" and "otherwise qualified" within the meaning of the statute. The district court found that Traynor began drinking to intoxication when he was between eight and ten years old, that he drank heavily during his military service, and that he was hospitalized five times between 1970 and 1974 for "treatment for saturated alcoholic disorders." No. 86-622, Pet. App. 44a-45a. After his last hospitalization, Traynor joined Alcoholics Anonymous and has not had a drink since February, 1974. *Id.* at 46a. Therefore the court found that he was alcoholic and a "handicapped individual" within the meaning of Section 504. *Id.* at 74a. The court further found that Traynor was "otherwise qualified," having been honorably discharged from the armed services and having subsequently enrolled in a degree program in mechanical engineering at the City College of New York. *Id.* at 46a-47a, 75a-76a.

record of an impairment which has substantially limited major life activities). Similarly, at the time that he applied for an extension of VA education benefits, petitioner McKelvey was successfully treated for alcoholism and was able to meet "the academic and technical standards requisite to admission or participation in the recipient's education program or activity." See 38 C.F.R. § 18.403(k)(3) (VA definition of "otherwise qualified") for educational benefits incorporating HHS regulation. 45 C.F.R. § 84.3(k)(3). No. 86-737, Pet. App. 43a (McKelvey "otherwise qualified"). Indeed, although it felt bound to deny petitioner McKelvey an extension due to the *per se* effect of the regulation at issue here, the Board of Veterans Appeals stated clearly that there is "no doubt that if an extension were granted [McKelvey] would use the benefits wisely and become a more productive member of society." *Id.* at 29a. To deny petitioners this beneficial opportunity on the basis of an arcane regulation which stereotypes alcoholics is plainly inconsistent with Section 504.

II. THE VETERANS' ADMINISTRATION'S DETERMINATION THAT PRIMARY ALCOHOLISM IS "WILLFUL MISCONDUCT" PER SE IS INVALID UNDER SECTION 504

The Veterans' Administration has by regulation and administrative interpretation conclusively determined that primary alcoholism is the result of willful misconduct. See pp. 11-13, *supra*. Thus, an individual whose alcoholism is not found to have been caused by a psychiatric disorder or whose alcoholism has not led to an underlying organic disorder (such as cirrhosis) is automatically ineligible for an extension of time in which to receive educational benefits that otherwise would be allowed for a disability pursuant to 38 U.S.C. § 1662(a)(1). This *per se* administrative rule, which prevents petitioners from presenting evidence from their own personal case histories to prove that their primary alcohol-

ism was not caused by willful misconduct, is clearly invalid under Section 504.[11]

As noted above, Section 504 was enacted to prevent categorical exclusion of handicapped individuals from federal programs and to ensure that decisions were based on the facts of each individual case. Section 3.301(c)(2) is just such an unlawful categorical rule. As interpreted by the Veterans' Administration, the regulation prevents primary alcoholics from putting on any evidence that the cause of that alcoholism was not willful misconduct. Such an outdated view is contrary to the great weight of contemporary medical evidence which views primary alcoholism as a disease with complex genetic, psychological, social and familial origins. See pp. 5-8, *supra*. Although the origins of primary alcoholism are not entirely clear and may differ in individual cases, it does not follow that primary alcoholism is thus necessarily caused by willful misconduct in each individual case. *Id.*[12] Under fundamental principles of Section 504, an individual claimant suffering from primary alcoholism should at least have the opportunity to present evidence that the disease was not the product of "willful misconduct." Thus, the Veterans' Administration's interpretation of 38 C.F.R. § 3.301(c)(2) is clearly unlawful.

The D.C. Circuit's broad assertion (No. 86-737, Pet. App. 14a) that the Veterans' Administration was not dis-

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[11] The Veterans' Administration does not dispute that its educational benefits program is subject to the limitations and requirements of Section 504. *See* 38 C.F.R. Part 18, Subp. D., App. A.

[12] The VA is misusing the primary-secondary distinction. That distinction has nothing to do with whether the individual's alcoholism is necessarily volitional. The VA's interpretation of "willful misconduct" also assumes incorrectly that it is always possible to differentiate between "primary" and "secondary" alcoholism. This assumption is manifestly incorrect. *See* pp. 6-8, *supra*. Moreover, in light of the real possibility that a given veteran may not receive an accurate diagnosis of primary as opposed to secondary alcoholism (*see supra* pp. 7-8), it would be manifestly unfair to deny benefits solely on the basis of this diagnosis.

criminating against petitioner McKelvey "solely by reason of his handicap" but rather on the basis of his "conduct" simply begs the question whether the conduct was the result of disease or the result of willfulness. That must be a question of fact in each individual case, given the complexity of alcoholism and the numerous individual manifestations of the disease. Indeed, the court of appeals' conclusory point was effectively rejected by this Court in *Arline*. The Court did not accept the contention of the United States that the effect of a disease on others could be separated from the effect of the disease on the handicapped individual in order to allow irrational discrimination by federal fund recipients based on fear of contagiousness. As this Court stated,

> "Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." *Arline*, slip op. at 7.

Similarly, it would be "unfair" to deny petitioners an extension of the time for receiving education benefits based upon a distinction between the disease and conduct which may be part of the disease. *Arline* thus compels rejection of the court of appeals' blanket view that a person with primary alcoholism may automatically be denied an extension because of his or her "conduct."

The court of appeals has done clear violence to the intent of Congress in Section 504 by holding that the decision whether primary alcoholism is "willful misconduct" is not a "medical judgment" but should be decided on the basis of "general societal perceptions regarding personal responsibility." No. 86-737, Pet. App. 12a. It is precisely these kinds of perceptions which Congress concluded should not serve as the basis for denying someone who is handicapped by a disease the benefits of a federally conducted program or activity. This is not to say that

conduct relating to the consumption of alcohol is not or can never be "willful misconduct," but it does mean that the VA is precluded from concluding that all primary alcoholism is volitional, regardless of the veterans' proffered evidence to the contrary.[13]

Nor is there any basis, under a proper reading of Section 504, for the court of appeals' view that deference is owed to the "reasonableness" of the agency's view that primary alcoholism is *always* the result of "willful misconduct." No. 86-737, Pet. App. 11a.[14] The origins of 38 C.F.R. § 3.301(c)(2) go back nearly 60 years to the Prohibition era.[15] There has been no analysis by the VA in the modern era of the changed medical views concerning alcoholism, including the policy statements of *amici* American Medical Association and American Psychiatric Associa-

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[13] There is no reason for the Court in this case to attempt to sort out what types of conduct related to alcohol consumption can properly be deemed "willful misconduct." Once the Court holds that some primary alcoholism is not "volitional," then the VA should evaluate on a case-by-case basis whether the veteran seeking benefits has in fact willfully become or remained an alcoholic. In this case, petitioners offered evidence showing that their alcoholism in effect started when they were teenagers or even younger and was in large part encouraged by their families at that time. If so, it would be unwarranted to conclude that their alcoholism was the product of volition, much less that it was a consequence of any "willful misconduct."

[14] Moreover, the concern of the court of appeals that an individualized interpretation of willful misconduct would interfere with the VA's ability to administer its disability program is unfounded. No. 86-737, Pet. App. 26a. There might be circumstances in which the VA could find that a veteran was not "otherwise qualified" due to his "willful misconduct," if, for example, in conjunction with other factors supporting a finding of willful misconduct, the VA found that an alcoholic had been informed about his illness by a professional and informed about the need for treatment, yet he nevertheless declined to seek any treatment which might permit him to control his illness. Such a rule would provide significant incentive for alcoholic veterans to seek treatment which, if successful, would end their need for disability benefits.

[15] *See* p. 12, *supra*.

tion that alcoholism is a disease with complex origins, which cannot be dealt with categorically as willful. There has been no administrative record concerning alcoholism developed by the Veterans' Administration since Section 504 was enacted, even though the statute clearly requires careful analysis of contemporary knowledge about handicapping diseases and individualized decisionmaking in the context of such an analysis. Thus, the purported "reasonableness" of the agency's categorical interpretation is supported factually by nothing more than a single footnote in the agency's appellate brief. No. 86-737, Pet. App. 11a, citing Br. of Respondent Turnage at pp. 18-19 n.4. This kind of *post hoc* rationalization will not suffice to justify disregarding the mandate of Section 504 to provide individualized evaluations of the medical condition of handicapped individuals who are being denied benefits. *Cf. Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962). Under Section 504, an agency must, at a minimum, analyze the available evidence about a given handicap before setting policy for making individualized determinations as to that handicap.[16]

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[16] This Court need only decide in this case that the VA's administrative interpretation is invalid under Section 504. It need not decide whether there is an inherent and irreconcilable conflict between Section 504 and 38 U.S.C. § 1662(a)(1). There is no indication that Congress clearly incorporated the Veterans' Administration's willful misconduct regulation when it reenacted the statutory time prescription of 38 U.S.C. § 1662(a)(1). As Judge Ginsburg ably demonstrated in her dissent in *McKelvey*, the legislative history of Section 1662(a)(1) is at best ambiguous in referring to VA standards for determining "willful misconduct." No. 86-737, Pet. App. 23a-24a. Moreover, it is the VA's administrative interpretation of its regulation that creates the direct conflict with Section 504. The Senate Report language relied upon by the VA indicates congressional concern that the same standards be applied in all VA programs for determining when a disability is the result of willful misconduct. The Senate Report language clearly cannot be construed to indicate congressional incorporation of every administrative interpretation of all related VA regulations.

[Footnote continued]

Accordingly, assuming no jurisdictional bar,[17] the cases should be remanded to the Veterans' Administration with instructions to allow petitioners to introduce evidence that their alcoholism was not caused by their own willful misconduct.

CONCLUSION

For the reasons stated above, the American Medical Association and the American Psychiatric Association respectfully request that this Court declare invalid, under Section 504, 38 C.F.R. § 3.301(c)(2) as interpreted and applied by the Veterans' Administration.

Respectfully submitted,

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[16] [Continued]

Finally, under traditional principles of statutory construction, whenever two statutes are capable of being construed harmoniously by looking to the plain meaning of each, that plain meaning should be given effect to avoid conflict. *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose," *citing Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)). The administrative interpretation by the Veterans' Administration would lead to just such an unnecessary conflict, and accordingly should be rejected.

[17] *Amici* take no position on the jurisdictional issues in this case.